

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1299

To be argued by
DAVID A. CUTNER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1299

UNITED STATES OF AMERICA,

Appellee,

—v.—

DERYL WILSON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



DAVID A. CUTNER,
S. ANDREW SCHAFER,
*Assistant United States Attorneys,
Of Counsel.*

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DAVID A. CUTNER being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the *7TH* day of *JUNE*, 1974
he served 2 copies of the within brief by placing the
same in a properly postpaid franked envelope addressed:

DONALD A. ALTMAN, Esq
4 A MAIN ST
Haverstraw, N.Y.

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for mailing
at the United States Courthouse, Foley Square, Borough
of Manhattan, City of New York.

David A. Cutner

Sworn to before me this

7th day of *JUNE*, 1974
Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
The Defense Case	4
ARGUMENT:	
POINT I—There was ample evidence of defendant's participation in a conspiracy to distribute narcotics to support the jury's verdict	6
POINT II—The claimed inconsistency in the jury's verdict is no ground for reversal. In any event, there was no inconsistency	7
CONCLUSION	9

TABLE OF CASES

<i>Dunn v. United States</i> , 284 U.S. 390 (1932)	7
<i>United States v. Abrams</i> , 427 F.2d 86 (2d Cir. 1970), <i>cert. denied</i> , 400 U.S. 832 (1970)	8
<i>United States v. Calabro</i> , 449 F.2d 885 (2d Cir. 1971), <i>cert. denied</i> , 404 U.S. 1047 (1972)	7
<i>United States v. Calarco</i> , 424 F.2d 657 (2d Cir. 1970), <i>cert. denied</i> , 400 U.S. 824 (1970)	7
<i>United States v. Carbone</i> , 378 F.2d 420 (2d Cir. 1967), <i>cert. denied</i> , 389 U.S. 914 (1967)	8

	PAGE
<i>United States v. Catalano</i> , 439 F.2d 1100 (2d Cir. 1971), <i>cert. denied</i> , 404 U.S. 825 (1971)	8
<i>United States v. Fox</i> , 433 F.2d 1235 (D.C. Cir. 1970)	7
<i>United States v. Glasser</i> , 315 U.S. 60 (1942)	6
<i>United States v. Handel</i> , 464 F.2d 679 (2d Cir. 1972), <i>cert. denied</i> , 409 U.S. 984 (1972)	8
<i>United States v. Ruiz</i> , 477 F.2d 918 (2d Cir. 1973).....	7
<i>United States v. Schor</i> , 418 F.2d 26 (2d Cir. 1969)....	8
<i>United States v. Tyminski</i> , 418 F.2d 1060 (2d Cir. 1969), <i>cert. denied</i> , 379 U.S. 1075 (1970)	7, 8

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-1299

UNITED STATES OF AMERICA,

Appellee,

—v.—

DERYL WILSON,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Deryl Wilson appeals from a judgment of conviction entered on March 1, 1974, in the United States District Court for the Southern District of New York, following a two-day trial before the Honorable Morris E. Lasker, United States District Judge, and a jury.

Indictment S-74 Cr. 38 was filed on January 14, 1974, in two counts. Count One charged defendant Deryl Wilson and others to the Grand Jury unknown with conspiring to distribute narcotics, in violation of Section 846 of Title 21, United States Code. Count Two charged Deryl Wilson with possessing with intent to distribute, and distributing, approximately 65.1 grams of heroin hydrochloride, in violation of Sections 812, 841(a)(1), and 841(b)(1)(A) of Title 21, United States Code.

The trial against defendant Wilson commenced on January 16, 1974 and concluded on January 17, 1974, when the

jury returned a verdict of guilty on Count One and acquittal on Count Two. On March 1, 1974, Judge Lasker sentenced Wilson to the custody of the Attorney General for treatment and supervision as a youth offender, pursuant to Sections 5010(b) and 5017(c) of Title 18, United States Code. Wilson is presently free on bail pending the outcome of this appeal.

Statement of Facts

The Government's Case

The Government's case against defendant Wilson was based, in large part, on the testimony of an undercover agent, William Simpson. Simpson testified that, on May 21, 1973, following a telephone call placed by a paid informant, Sam, he and Sam went to Singleton's Bar, located at 122nd Street and Eighth Avenue in New York City. At the bar, Sam introduced the undercover agent to the defendant (Tr. 25-30).*

Simpson asked the defendant Wilson if he had the one-eighth kilogram of heroin, and Wilson replied that the heroin should be delivered in the bar within the hour and that it would cost \$4,500. Simpson and Sam left the bar and returned in about an hour. Upon their return, the defendant stated that the heroin had not yet arrived, but again said that it should be there within the hour (Tr. 31-32).

Simpson and Sam remained in the bar, and while they were waiting for the heroin to arrive, the defendant told Simpson that he made close to \$1,500 per week selling

* Appellant provided the Government with no notice of what he intended to include in the appendix, nor did he serve a designation on the Government, as required by Rule 30(b), Federal Rules of Appellate Procedure. Since not all of the testimony upon which the Government relies is contained in the appendix, citations herein are to the trial transcript.

heroin, and that he paid the owner of the bar \$200 per week to permit him to sell heroin in the bar. The defendant also showed Simpson some small cellophane packages, stating that they contained heroin. The defendant sold several of these packages to various individuals who came into the bar, while Simpson waited. The defendant Wilson bragged to Simpson that he made a lot of money at the bar, and he showed Simpson a roll of \$100 and \$50 bills, which Simpson estimated to total \$1,500 (Tr. 32-33).

After about an hour, two men arrived at the bar. The defendant spoke with them briefly, and then came over to Simpson and asked for the \$4,500. Simpson asked for the heroin, and the defendant said "I just want to count the money and make sure everything is okay." Simpson retrieved the money from the trunk of his car, and then counted it out in the men's room of the bar while the defendant looked on. After satisfying the defendant that he had the \$4,500, Simpson and Sam followed the defendant and the two men who had just arrived out of the bar and into an apartment building next door to the bar (Tr. 34-35).

After entering the apartment building, the two men immediately went up the stairs. The defendant told Simpson and Sam to wait in the corridor, and then also went upstairs. In about five minutes, one of the two men came downstairs and went directly out of the building. About two minutes later, defendant Wilson came downstairs and asked for the \$4,500. Simpson gave him the money. Wilson walked half way back up the stairs, and someone handed him a package. Wilson came back down, and he and Simpson and Sam walked out of the building and got into Simpson's car (Tr. 35-36).

In the car, Wilson gave the package, which contained heroin, to Simpson. Wilson told Simpson that next time he came to New York, he should not come to the bar to

purchase heroin in large quantities, because one of the junkies might try to rob him. Wilson said that Simpson should call him at home to arrange a different meeting place. Wilson also said that the heroin would take a four or five cut, and that Simpson should call him and let him know how the package was. Wilson then got out of the car and Simpson drove away (Tr. 36-37, 202-205).

Special Agent Robert Grant and Assistant United States Attorney Michael Mukasey testified to admissions of the defendant at a post-arrest interview. After being advised of his rights, Wilson was asked if he were willing to make a statement, and he replied: "Sure, it don't make no difference, they caught me." He went on to say that "A guy came to me and said he wanted heroin. I said wait a week. He came back and I got it for him from a dude named Sugar. This happened at 122nd and 8th Avenue in a bar. The transaction went off outside in the hallway. About four ounces and some involved. This happened sometime around the end of May" (Tr. 123-129, 179-184, 291; GX 4).

The Defense Case

Deryl Wilson testified in his own behalf and was the only defense witness.

On direct examination, Wilson testified that he was at Singleton's Bar on May 21, 1973 when Simpson and Sam arrived. Sam called Wilson aside and said "Look, just be cool and I am sure you will make lots of money." Sam had made arrangements with two fellows who Wilson thought must be "robber dudes." Wilson didn't want to have anything to do with them, but Sam came back and said "No, they are not going to rob, everything is cool, just go along with it" (Tr. 218-220).

One of the two fellows told Wilson that he would be given \$500 to split with Sam. All he had to do was go into the bathroom with Simpson to verify that Simpson had the

money. Wilson did that, and then reported back to the two fellows. Later on, he got curious and went out to the car when Sam opened the package. It was "brown dope," unlike the white heroin introduced into evidence at trial (Tr. 221-223).

Wilson denied that he dealt in drugs, and that he made a statement to Mr. Mukasey concerning dealing in drugs (Tr. 224, 226).

On cross examination, Wilson testified that he did not know that Sam was going to be at the bar that day, or that there was going to be a sale of narcotics. When he was asked to verify that Simpson had \$4,500, Wilson realized that Simpson expected to purchase some narcotics, but thought that Simpson was going to be sold some flour or be robbed (Tr. 260-262).

Wilson "got kind of shaky, you know, because I figured somebody was going to get hurt," but he went along with it because "All I have got to do is tell them okay and get the money." After watching Simpson count out the money in the bathroom, Wilson went to the apartment building hallway "to look out for the interests of my money. I supposed (sic) to get \$500." In the hallway, one of the two fellows handed a package to Sam, and Sam gave him some money. Wilson then walked out to the car with Simpson and Sam, and sat in the car while Sam took a "blow" of the heroin (Tr. 264, 270-278).

Wilson also testified that Sam had proposed to sell flour to a narcotics purchaser on several prior occasions. Wilson refused to become involved because he was afraid he might be killed. He was not afraid to watch Simpson count out the money in the bathroom, or be in the hallway or in the car on May 21, 1973, however, because he was not going to handle the merchandise (Tr. 264-265, 278-279).

ARGUMENT

POINT I

There was ample evidence of defendant's participation in a conspiracy to distribute narcotics to support the jury's verdict.

The evidence at trial was more than sufficient to support the jury's verdict that Wilson was engaged in a conspiracy to distribute narcotics. Wilson agreed to sell the undercover agent Simpson an eighth of a kilogram of heroin. While awaiting its delivery, Wilson bragged about his lucrative narcotics dealings, flashed a large sum of cash, and displayed some cellophane packages allegedly containing heroin. The subsequent arrival of two unidentified men at the bar immediately led to Wilson's demand to see Simpson's money. After a trip to the bathroom to count the money, Wilson and Simpson left the bar with the two men. They all entered an adjacent apartment building together. Subsequently, on the apartment stairs, someone handed Wilson the package of heroin, which Wilson delivered to Simpson in the car.

Wilson's own testimony corroborated significant details of the Government's case. Wilson admitted that he agreed to assist the "two fellows" by making sure that Simpson had \$4,500, and that he was to receive a share of \$500 for his trouble. He also admitted going to Simpson's car to take a look at the heroin. He attempted to maintain that he was not involved in the narcotics transaction, however, on the ground that he was not the one who physically delivered the heroin to Simpson.* This position is, of course, factually and legally incorrect.

*It was not until midway through cross-examination that Wilson asserted that he thought the "two fellows" were going to sell Simpson flour, rather than heroin. However credible this assertion might still appear to defense counsel, the jury's verdict forecloses further consideration of it. *United States v. Glasser*, 315 U.S. 60 (1942).

Viewing this evidence alone in the light most favorable to the Government, the jury could reasonably conclude that the defendant was guilty of conspiracy. See, *United States v. Ruiz*, 477 F.2d 918 (2d Cir. 1973); *United States v. Calabro*, 449 F.2d 885 (2d Cir. 1971), cert. denied, 404 U.S. 1047 (1972); *United States v. Calarco*, 424 F.2d 657 (2d Cir. 1970), cert. denied, 400 U.S. 824 (1970).

Wilson further argues that Simpson was the only government witness who testified to the conspiracy, and that his own testimony contradicted Simpson's. But the uncorroborated testimony of a single witness is sufficient to support a conviction, cf., *United States v. Tyminski*, 418 F.2d 1060 (2d Cir. 1969), cert. denied, 379 U.S. 1075 (1970), and in this case Simpson was corroborated by judicial and extra-judicial admissions of the defendant.

Wilson also incorrectly assumes that the Government must prove all of the alleged overt acts set forth in the indictment, instead of only one. Defendant reasons that, having acquitted on the substantive count, the jury could not have found overt act number three, i.e., that defendant delivered the package to Simpson. Assuming this reasoning were valid, which it is not,* the Government still proved the remaining overt acts.

POINT II

The claimed inconsistency in the jury's verdict is no ground for reversal. In any event, there was no inconsistency.

Wilson's argument that the jury's verdict was inconsistent has been universally rejected as a ground for reversal. *Dunn v. United States*, 284 U.S. 390 (1932); *United States v. Fox*, 433 F.2d 1235, 1238, n. 21 (D.C. Cir. 1970).

* See Point II, *infra*.

Wilson nevertheless asserts that his conviction of conspiracy to distribute narcotics cannot stand in view of the verdict of acquittal on the substantive count. This Court squarely faced this precise contention in *United States v. Carbone*, 378 F.2d 420, 422 (2d Cir. 1967), *cert. denied*, 389 U.S. 914 (1967), and forbade "allowing the acquittal to upset or even to affect the simultaneous conviction." *Accord*, *United States v. Handel*, 464 F.2d 679, 681 (2d Cir. 1972), *cert. denied*, 409 U.S. 984 (1972); *United States v. Catalano*, 439 F.2d 1100, 1162 (2d Cir. 1971), *cert. denied*, 404 U.S. 825 (1971); *United States v. Abrams*, 427 F.2d 86, 90 (2d Cir. 1970), *cert. denied*, 400 U.S. 832 (1970); *United States v. Tyminski*, *supra* at 1061; *United States v. Schor*, 418 F.2d 26, 28 (2d Cir. 1969).

Furthermore, Wilson's contention rests on the faulty premise that "the jury demonstrated its disbelief of Special Agent Simpson's testimony and the Government case as a whole," by rendering a verdict of acquittal on the substantive count (Appellant's Brief at 8). To the contrary, the jury merely found that Wilson was not the "boss" or "co-boss" in the heroin transaction, and thus acquitted on the substantive count in accordance with erroneous instructions from the Court.* Wilson's attempt to bootstrap the acquittal into a reversal on the conspiracy count is thus entirely frivolous, as no inconsistency can be shown to exist.

* In response to a note from the jury, Judge Lasker delivered supplementary instructions on the substantive count. Engaging in colloquy with the jurors about the meaning of "constructive possession" of narcotics, and totally ignoring the "aiding and abetting" and *Pinkerton* theories of criminal liability, the judge charged the jury that "Control means control. Control doesn't mean having a hand in something. Control means you are the boss. Or co-boss, at least" (Tr. 353). The jury rendered its verdict only minutes later.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

DAVID A. CUTNER,
S. ANDREW SCHAFER,
*Assistant United States Attorneys,
Of Counsel.*